

Gregg McLean Adam, No. 203436
Gonzalo C. Martinez, No. 231724
Amber L. West, No. 245002
CARROLL, BURDICK & McDONOUGH LLP
Attorneys at Law
44 Montgomery Street, Suite 400
San Francisco, CA 94104
Telephone: 415.989.5900
Facsimile: 415.989.0932
Email: gadam@cbmlaw.com

Attorneys for Plaintiff and Cross-Defendant
San Jose Police Officers' Association

Teague P. Paterson, No. 226659
Vishtasp M. Soroushian, No. 278895
BEESON TAYER & BODINE
483 Ninth Street, 2nd Floor
Oakland, CA 94607-4051
Telephone: 510.625.9700
Facsimile: 510.625.8275
Email: tpaterson@beesontayer.com
vsoroushian@beesontayer.com

Attorneys for Plaintiff and Cross-Defendant
Municipal Employees' Federation, AFSCME,
Local 101

Stephen H. Silver, No. 038241
Jacob A. Kalinski, No. 233709
**SILVER, HADDEN, SILVER, WEXLER
& LEVINE**
1428 Second Street
Santa Monica, CA 90401
Telephone: (310) 393-1486
Facsimile: (310) 395-5801
Email: shsilver@shslaborlaw.com

Attorneys for Plaintiff San Jose Retired
Employees' Association

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

SAN JOSE POLICE OFFICERS'
ASSOCIATION,

Plaintiff,

v.

CITY OF SAN JOSE, BOARD OF
ADMINISTRATION FOR POLICE
AND FIRE DEPARTMENT
RETIREMENT PLAN OF CITY OF
SAN JOSE, and DOES 1-10, inclusive,

Defendants.

AND RELATED CROSS-COMPLAINT
AND CONSOLIDATED ACTIONS

No. 1-12-CV-225926
(and Consolidated Actions
1-12-CV-225928, 1-12-CV-226570,
1-12-CV-226574, 1-12-CV-227864,
and 1-12-CV-233660)

**PLAINTIFFS SAN JOSE POLICE OFFICERS'
ASSOCIATION; MUNICIPAL EMPLOYEES'
FEDERATION, AFSCME, Local 101; AND
SAN JOSE RETIRED EMPLOYEES'
ASSOCIATION'S OPPOSITION TO CITY OF
SAN JOSE'S MOTIONS IN LIMINE**

Complaint Filed: June 16, 2012
Trial Date: July 22, 2013

I

INTRODUCTION

The City of San Jose has filed a dozen Motions *in Limine* ("MIL"), seeking exclusion of Plaintiffs' evidence without providing adequate explanations to support the rulings the City seeks. As discussed in further detail below, the City issues flatly incorrect descriptions of the evidence and of its probative value.

In one of its motions (MIL #12), the City fails to make any argument whatsoever. In other instances, the City obfuscates the issue by seeking exclusion of evidence that, in fairness, must be allowed for rebuttal purposes. Similarly, the City seeks to limit the evidence at trial by stating, for example, that retiree health care is not at issue. But it is not up to the City to determine that – the Plaintiffs have filed suit alleging Measure B does illegally reduce vested retiree health care benefits. This is a matter for the Court to determine at trial and the City misuses the *in limine* process to bring that argument.

More fundamentally, the City seeks rulings on evidence that is highly probative to the Court's vested rights inquiry. In some instances, even if the Court were to exclude certain evidence, it could not possibly make such a ruling prior to trial. The Court is fully capable of managing the trial process, including the process of making evidentiary rulings at the proper time. Thus, some of the motions are premature and undeveloped, improperly brought due to their timing.

For all of these reasons, the City's *in limine* motions all should be denied.

II

MEMORANDUM OF POINTS AND AUTHORITIES

A. The Court Should Deny the City's Motion *in Limine* No. 1 Seeking Exclusion of Evidence Related to Mayor Reed's Statements Regarding Projected Retirement Costs

The Court should deny the City of San Jose's motion to exclude evidence concerning the City's arguments that worsening fiscal conditions led it to place Measure B on the ballot. Specifically, the City seeks exclusion of an unfounded retirement cost

1 estimate made by the Mayor Chuck Reed, and evidence related to his statement. Reed
2 estimated – as it turns out, without basis – that the City’s 5-year projection of retirement
3 costs was \$650 million. Other, related evidence shows Reed made the statement
4 repeatedly and publicly during months of City officials’ discussions regarding drafting a
5 ballot reform measure to cut retirement costs. Finally, the City seeks to exclude an
6 August 12, 2012 report by the California State Auditor that the \$650 million figure was
7 “unfounded and likely overstated.” The City claims that the evidence is irrelevant and
8 inadmissible hearsay.

9 First, the evidence is admissible as admissions under several exceptions to the
10 hearsay rule. Ev.C. §§ 1220–1227. Second, the evidence is highly relevant, especially if
11 the City is permitted to call multiple City officials to testify to the same thing – that
12 retirement costs and other City costs were rising when Measure B was discussed as a
13 possibility, then drafted, and then put forth on the ballot. But even if the City is not
14 permitted to introduce this evidence, it makes no argument supporting why Plaintiffs
15 cannot bring evidence of the City’s overstatement to the voters of San Jose regarding
16 retirement costs, just before the City placed Measure B on the ballot. It unjustifiably
17 claims that the evidence is irrelevant.

18 Not only is the evidence relevant for the reasons stated above, but it is also
19 relevant as AFSCME alleged in its complaint that Measure B constitutes an
20 unconstitutional bill of attainder. In determining whether a legislative act is an unlawful
21 bill of attainder, courts examine whether the legislative record evinces an intent to punish
22 and analyzes whether the law can reasonably be said to further non-punitive legal
23 purposes. (*Nixon v. Administrator of Gen. Servs.* (1977) 433 U.S. 425, 478 (“*Nixon*”).)
24 AFSCME alleges that Mr. Reed’s reckless and unfunded overstatement of the City’s
25 unfunded liabilities is further evidence of his discriminatory animus towards City unions
26 and his intent to single them out for punitive treatment. Therefore, this evidence should
27 not be excluded.

1 **1. Alternatively, all evidence regarding the City's ability to**
2 **meet its fiscal obligations – retirement and otherwise –**
3 **should be excluded.**

4 Alternatively, Plaintiffs concede that the City's motion *in limine* #1 may be
5 granted on the condition that the Court also grant SJPOA's and SJREA's motion *in limine*
6 #2. In other words, Plaintiffs admit that the evidence the City wishes to have excluded
7 could be, in the event that the Court grants SJPOA's and SJREA's MIL #2. In that
8 motion, Plaintiffs seek exclusion of evidence of San Jose's fiscal condition, rising
9 retirement costs, and ability to afford to keep its financial commitments to its employees.

10 And there is no reason for the Court *not* to exclude all evidence of the ability of
11 the City to meet retirement and other costs it is obligated to pay. The City has no plan to
12 bring evidence of fiscal emergency. On June 25, 2013, counsel for the City of San Jose,
13 Art Hartinger, wrote to SJPOA's counsel, Gregg Adam. (*See* SJPOA and SJREA's MIL
14 #2., Ex. 1.) The letter indicated the City will not bring a fiscal emergency defense under
15 *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d
16 296. In *Sonoma*, the California Supreme Court discussed conditions under which the state
17 can exercise *limited* police powers in the vested rights context. (*See id.* at 309.) Here, the
18 City would not meet that standard, because, among other reasons, it is undisputed that
19 Measure B does not impose *temporary* cuts. Under *Sonoma*, police powers (and benefit
20 cuts) can only be briefly justified, during the course of a fiscal emergency. (*See id.* at
21 305-308.)

22 As framed by the unions' pleadings, the issues for trial are the existence of a
23 vested right and substantial impairment by the City. (*Betts v. Board of Administration*
24 (1978) 21 Cal.3d 859, 863-864 ("A public employee's pension constitutes an element of
25 compensation, and a vested contractual right to pension benefits accrues upon acceptance
26 of employment. Such a pension right may not be destroyed, once vested, without
27 impairing a contractual obligation of the employing public entity"; constitutional changes
28 to pensions "must bear some material relation to the theory of a pension system and its
 successful operation, and changes in a pension plan which result in disadvantage to

1 employees should be accompanied by comparable new advantages”].) Because the City
2 has disclaimed a fiscal emergency defense, the concerns of the City’s fisc are irrelevant to
3 determining what vesting may or may not have occurred; whether the right was
4 substantially impaired; and in short, is irrelevant to any aspect of this case.

5 To be clear, SJPOA’s and SJREA’s Motion *in limine* #2 notably does *not* ask
6 the Court to exclude evidence related specifically to actuarial projections or the impacts of
7 Measure B in relation to the health of the *pension system*—which is clearly relevant under
8 *Betts*—because they acknowledge that the City may present evidence of the reasonability
9 of changes necessary to keep the pension system itself solvent. That, however, is not the
10 same as the City’s evidence concerning its ability to meet expenses, including retirement
11 expenses. Thus, if the City’s Motion *in Limine* #1 is granted, so, too, should SJPOA’s
12 and SJREA’s Motion *in Limine* #2.

13 Finally, Plaintiffs argue that if the Court rules in the City’s favor granting the
14 City’s Motion *in Limine* #1, the ruling should be made conditional upon the City bringing
15 *no evidence* to support its irrelevant arguments concerning its ability to meet its financial
16 commitments. Plaintiffs ask that this include, but not be limited to, granting SJPOA’s and
17 SJREA’s MIL #2.

18 **B. The Court Should Deny the City’s Motion *in Limine* Nos. 2 and 4**

19 The City seeks exclusion of evidence of the City’s obligations to provide
20 vested benefits. (*See, e.g.*, Exhibits A, B & C attached to the Declaration of Amber West
21 (West Decl.) in Support of SJPOA’s Opposition to the City’s Motions *in Limine*.) This
22 evidence includes statements of City officials as well as legal opinions provided to the
23 City in relation to City employees’ vested benefits.

24 The City makes no specific argument as to why the Memoranda of former
25 Deputy City Attorney Susan Devencenzi should be excluded. For this reason, the Court
26 should deny the motion. Moreover, the opinions set forth in Devencenzi’s Memoranda
27 are probative as to what the City knew to be its pension payment obligations and,
28 specifically, its obligation to fund the pension funds’ unfunded accrued actuarial liability.

1 For example, Devencenzi's September 17, 1997 Memorandum to the Board of
2 Administration of the P&F Retirement Plan states that the employee pays 3/11 of the
3 current service contribution rate and the "contributions to fund the UAAL (unfunded
4 actuarial accrued liability) are allocated entirely to the City." (Exhibit A, attached to West
5 Decl.) The Memo goes on to state that if the Plan liabilities increase, then the City will
6 have to increase its contribution rate for the UAAL. The conclusion of Devencenzi's
7 Memorandum states, "... contributions for the unfunded actuarial accrued liability are
8 allocated entirely to the City." (*Id.*) In addition, a December 29, 1997 memo by
9 Devencenzi outlines the history of the Plan.¹ (Exhibit B, attached to West Decl.) Thus,
10 the Court should deny this motion because the City fails to state why the evidence should
11 be excluded and because the evidence is very probative regarding the City's obligations,
12 and its understanding of those obligations, regarding payment of UAAL. .

13 The City's **Motion in Limine #2** contains a brief argument stating that because
14 it will be the Court that opines on Measure B's legality, "third party opinions are
15 irrelevant." But the City misunderstands the purpose of inclusion of these opinions. The
16 purpose is to show the documents were provided *to* the City, showing its understanding of
17 its obligations.² Also, the documents are public -- were provided *by* the City *to* the public
18 -- which is probative of the understanding of City employees regarding what the City saw
19 as its obligations to them.³ Similarly, the opinions by Saltzman & Johnson indicated, inter
20
21
22

23 ¹ For example, the memo states that in 1979, the Plan was changed to shift contributions
24 for the unfunded liability entirely to the City; and it explains how the City has historically
25 funded the UAAL and states that "the contributions to fund the UAAL are allocated
26 entirely to the City." (Exhibit B, attached to West Decl.)

27 ² For example, the Jones Day memo states "a collective bargaining unit may not bargain
28 away individual statutory or constitutional rights that 'flow from sources outside the
collective bargaining agreement itself,' and collective bargaining agreements may not
contain provisions that abrogate . . . constitutional rights" such as "pension rights."
(Exhibit D, attached to West Decl.)

³ The City does not contend in its motion that the opinions are privileged.

1 alia, the City's historic understanding of its UAAL obligations.⁴ Nor is any memorandum
2 at issue in this motion lengthy and, thus, is not overly time consuming. The Court should
3 deny this motion because this set of memoranda – all made publicly available by the City
4 -- is highly probative as to both the City's understanding of its pension obligations and
5 what it communicated about those obligations.

6 The City also moves, under its **Motion in Limine #4**, to exclude evidence,
7 testimony, and argument about the March 4, 2008 Memorandum from Deborah Figone.
8 (Attached as Exhibit 5 to the Declaration of Arthur A. Hartinger in support of the City's
9 Motions *in Limine*.) In that memo, City Manager Figone stated retiree health care benefits
10 can be considered vested ("Because San Jose's retiree healthcare benefits are part of the
11 City's retirement plans, the retiree healthcare benefit *can be considered a 'vested' benefit*
12 *similar to the pension benefit itself.*" [emphasis added].) The City argues the Memo and
13 related evidence should be excluded as having no probative value because Measure B "did
14 not change" retiree medical benefits. But the City abuses the process of seeking exclusion
15 of evidence to limit the issues at trial. Plaintiffs have, in fact, alleged that retiree medical
16 benefits have been reduced by Measure B. (*See, e.g.,* SJPOA's First Amended Complaint
17 ¶ 56-57, 72-88.) The Court, not the City, will determine whether this is so. The Figone
18 Memorandum is probative of Plaintiffs' claims regarding what the City knew its
19 obligations to be as to vested retiree health benefits and therefore MIL #4 should be
20 denied.

21 1. AFSCME's Promissory and Equitable Estoppel Claims

22 AFSCME has causes of action for promissory and equitable estoppel within its
23 First Amended Complaint. To make a case for estoppel a plaintiff must, in part,

24 ⁴ A February 19, 1998 memo addresses whether in times of surplus the "actuarial
25 surplus" in the Plan can be used by the City to reduce its pension contributions (the City
26 did, in fact, reduce them by \$80 million when the P&F Retirement Plan had an actuarial
27 surplus in fiscal years 1993 through 2004; employee contributions were not similarly
28 reduced during the actuarial surplus years). The memo also states that "in periods when
the retirement fund has an actuarial deficit, the San Jose Municipal Code requires the City,
and not the members, to fund this deficit in an actuarial sound manner." (Exhibit C,
attached to West Decl.)

1 demonstrate detrimental reliance. (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462,
2 489 [equitable estoppel]; *Van Hook v. S. Cal. Waiters Alliance, Local 17* (1958) 158 Cal.
3 App. 2d 556 [promissory estoppel].) The Figone Memorandum was circulated to all City
4 employees. Thus, AFSCME members read and relied upon this document, as well as
5 others, and reached a conclusion that they were either vested in their retiree health
6 benefits/contribution rates or would become so after 15 years of service. Many of them
7 based a decision to continue working for the City on that representation (that the City
8 would not change their retiree health benefits because the City perceived such benefits to
9 be vested).

10 **C. Opposition to Motion in Limine No. 3**

11 Plaintiffs/Petitioners ("Petitioners") do not intend to call Susan Devencenzi as
12 part of their case in chief. This in no way prejudices the Petitioners' rights to call
13 Devencenzi on rebuttal if necessitated by the City's case in chief.

14 If the Petitioners do call Devencenzi, they will not ask her to disclose any
15 privileged communications that the City has not waived. The City fails to cite any
16 authority for the proposition that a witness can be excluded entirely because the witness
17 may hypothetically be asked about a privileged communication, and there is no such
18 blanket prohibition against the testimony of a witness. If any privilege issue materializes
19 at trial, the City can object when the issue becomes non-speculative. Granting the City's
20 motion would require this Court to rule in a vacuum and is contrary to the principles for
21 Motions in Limine enunciated in *Kelly v. New West Federal Savings* (1996) 49
22 Cal.App.4th 659, 670 (denying a motion to preclude calling witnesses not previously
23 identified in discovery responses because "[a]bsent a meaningful and expressed belief that
24 this may occur, this was a meaningless motion unless and until plaintiffs attempted to call
25 such witnesses.") Therefore, this motion in limine should be denied.

26 **D. Opposition to Motion in Limine No. 5**

27 The City argues that all evidence regarding collateral challenges to Measure B,
28 including administrative actions pending before the Public Employment Relations Board

1 (PERB), grievances and SJPOA's Quo Warranto challenge should be excluded on
2 relevance grounds. The City's overbroad motion should be denied as such evidence is
3 relevant to several aspects of this case. Each of these additional challenges to Measure B
4 are relevant to proving Petitioners' case as well as providing a complete narrative to an
5 incomplete one created by the City.

6 One cause of action in this litigation is a bill of attainder. Article I, section 9 of
7 the California Constitution prohibits the City from passing bills of attainder or inflicting
8 punishment on a select class of individuals. In determining whether a legislative act is an
9 unlawful bill of attainder, courts examine whether the legislative record evinces an intent
10 to punish and analyzes whether the law can reasonably be said to further non-punitive
11 legal purposes. (*Nixon v. Administrator of Gen. Servs.* (1977) 433 U.S. 425, 478
12 ("*Nixon*").) Petitioner AFSCME has alleged that the City's motivation to punish
13 AFSCME's members includes its filing of these PERB charges which inspired City
14 statements that it was waging a "war" on AFSCME. Further, the City's elimination of
15 sick leave payouts with respect to AFSCME members who refused to accept the City's
16 imposition of terms, but not various other employee groups, and which was later found
17 unconstitutional by the Superior Court in *Deisenroth v. City of San Jose*, is another fact
18 indicative of the City's intent towards AFSCE members. The PERB charges, then, are
19 relevant to the City's motivation, an issue in this case.

20 Additionally, another fact that weighs in favor of finding an improper bill of
21 attainder is a finding that "there are plainly less burdensome alternatives by which [the]
22 legislature ... could have achieved its legitimate nonpunitive objectives...." (*Con. Edison*
23 *v. Pataki* (2d Cir. 2002) 292 F.3d 338, 354 (citing *Nixon, supra*, 433 U.S. at 482).) As
24 part of the Unfair Practice Charge ("UPC") it filed with PERB with respect to Measure B,
25 AFSCME alleged that a coalition of union--of which AFSCME was a part for bargaining
26 purposes--presented the City with a "Grand Bargain" proposal which was designed to
27 serve as an alternative to Measure B and result in substantially equivalent cost-savings;
28 the UPC alleged that the City rejected this comprehensive offer without giving it much

1 consideration. By issuing a complaint in that case, AFSCME believes that the PERB
2 found such action by the City to constitute bad-faith bargaining. As such, the PERB
3 complaint supports the fact that Measure B constitutes an unlawful bill of attainder in that
4 the City did not consider a less burdensome alternative to achieving its asserted goals.

5 Furthermore, the City itself has opened the door to this evidence and made it
6 relevant to this proceeding by introducing evidence of collective bargaining between the
7 parties. The PERB charge are directly relevant to rebutting the City's argument that the
8 benefits at issue are not vested because, the City alleges, that the Petitioners have
9 bargained over pension and retiree health benefits in the past. (*See, e.g.*, City's Motion for
10 Summary Adjudication, pp. 24, 32.) The City's legally flawed argument ignores the
11 Constitutional protection afforded vested pension rights. In addition, and relevant to the
12 instant motion, the City's argument is premised on facts disputed by the Petitioners
13 regarding bargaining and which are the substance of the PERB charges against the City.

14 Moreover, PERB has issued a complaint against the City for bad faith
15 bargaining alleging that the City unlawfully imposed contract terms, including changes to
16 pension benefits and retiree health benefits. Thus, to the extent the City justifies its
17 conduct based on an asserted right to impose terms, this argument is undercut by the
18 pending litigation that the City had no such right. The City cannot simultaneously rely on
19 an argument that it lawfully implemented a last, best and final offer under the Meyers-
20 Milias-Brown Act (MMBA) and preclude the Petitioners from presenting evidence that
21 PERB, the agency charged with enforcing the Act, has issued a complaint against the City
22 for violating the MMBA in implementing its last, best and final offer.

23 The City argues that any evidence relating to these collateral challenges of
24 Measure B would "undoubtedly cause an enormous and undue consumption of time."
25 This speculative argument is not supported. Certainly, the court is in a better position to
26 evaluate such a hypothetical (and hyperbolic) claim when specific evidence is offered and
27 the court is aware of the relevance in context. (*Cf. People v. Jennings* (1988) 46 Cal.3d
28 963, 975 fn. 3.)

1 **E. Opposition to Motion in Limine No. 6(d)**

2 The City moves to exclude Charles Allen, designated as the person most
3 knowledgeable by Petitioner AFSCME Local 101 to testify regarding various topics, as a
4 witness from trial. The City cites to two cases to support its argument, *Thoren v. Johnston*
5 *& Washer* (1972) 29 Cal.App.3d 270 (“*Thoren*”) and *Deeter v. Angus* (1986) 179
6 Cal.App.3d 241 (“*Deeter*”), and misrepresents these narrow holdings. The City’s motion
7 is contrary to law. (See *Saxena v. Goffney* (2008) 159 Cal.App.4th 316 (“*Saxena*”).) The
8 City is simply not entitled to the evidence sanction of precluding a witness from testifying
9 based on asserted dissatisfaction with the deponent’s responses in a Motion in Limine.

10 **1. The City Misrepresents the Holdings in the Cases it Cites and the**
11 **Cases Are Inapposite**

12 In *Thoren* and *Deeter*, the appellate courts upheld the trial court’s exclusion of
13 evidence based on a finding that a party willfully concealed its existence in response to
14 interrogatories. (See *Thoren*, supra, 29 Cal.App.3d at 274-275, *Deeter*, supra, 179
15 Cal.App.3d at 254.) In *Thoren*, in response to an interrogatory seeking the identification
16 of witnesses who observed the scene of the injury, the party knowingly failed to identify a
17 witness and identified that witness for the first time in its opening statement at trial after a
18 jury had been impaneled. Importantly, in both cases, the opposing party was unaware of
19 the existence of the concealed evidence and, therefore, could not seek to compel it. The
20 City erroneously asserts that these cases hold that “[a] party cannot use evidence at trial
21 that is relevant and requested during discovery but which, for whatever reason was not
22 produced.” (City’s Motion, p. 8.) This is not the holding of either *Thoren* or *Deeter*.

23 In *Saxena*, the court explained that the *Thoren* holding is “narrow” and
24 “covering a circumstance not specifically dealt with in the Civil Discovery Act.” (159
25 Cal.App.4th at p. 334.) The exclusionary remedy in the *Thoren* case is limited to
26 situations where a party willfully and falsely conceals a witness’s name in response to
27 discovery and, thereby, subjects the adversary to unfair surprise. (*Saxena*, supra, 159
28 Cal.App.4th at p. 332 (citations omitted); see also *Biles v. Exxon Mobil Corp.* (2004) 124

1 Cal. App. 4th 1315, 1325 (overturning exclusion of a witness who was not identified in
2 discovery responses and reasoning that, “*Thoren* provides authority for excluding
3 evidence based on a willfully false discovery response.”).

4 **2. *Saxena* Controls and Forecloses the City’s Motion.**

5 The *Saxena* court went on to hold that for “evasive or incomplete discovery
6 responses . . . imposition of an evidence sanction is not one of the remedies.” (*Saxena*,
7 *supra*, 159 Cal.App.4th at p. 334.) The *Saxena* court reasoned that the Civil Discovery
8 Act (§ 2016.010 et seq.) provides specific remedies for evasive or incomplete discovery
9 responses: a motion to compel. Thus, in the absence of a violation of an order compelling
10 an answer or further answer, the evidence sanction may only be imposed where the
11 answer given is willfully false. The simple failure to answer, or the giving of an evasive
12 answer, requires the propounding party to pursue an order compelling an answer or further
13 answer—otherwise the right to an answer or further answer is waived and an evidence
14 sanction is not available. (*Id.*) “[T]he burden is on the propounding party to enforce
15 discovery. Otherwise, no penalty attaches either for the responding party's failure to
16 respond or responding inadequately.” (*Saxena*, *supra*, 159 Cal. App. 4th at p. 334.)

17 Here, of course, the City has not (and cannot) identify any willful concealment
18 of witness Charles Allen. The City knew of and, indeed, deposed this witness. Thus,
19 *Thoren* is inapposite.

20 The basis of the City’s motion, then, is that the identified witness, Charles
21 Allen, did not answer some unspecified questions at deposition. The City knew instantly
22 of any question that Allen did not answer to the City’s satisfaction. Therefore, the burden
23 was on the City, to compel further answers. The City is absolutely not entitled to an
24 exclusion of Allen as a witness at trial, especially when it has refused to meet and confer
25 over the issue, as discussed below.

26 In light of *Saxena*, this Motion *in Limine* is unauthorized by law. Under
27 California law, upon the refusal of the deponent to answer a question, the burden is upon
28 the party seeking discovery to obtain an order from the superior court to compel

1 disclosure. (*Saxena, supra*, 159 Cal.App.4th at p. 334; Code Civ.Proc., § 2034, subd. (a).)
2 For the aforementioned reasons, this Motion *in Limine* should be denied.

3 **3. The City Loses on the Merits as Well: Peeking at the Merits, No**
4 **Motion to Compel Will Issue Because the Witness Was Instructed**
5 **Not to Answer “Legal Contention Questions” in Accordance with**
6 **Law.**

7 The Court in *Rifkind v. Superior Court* (1994) 22 Cal.App.4th 1255
8 (“*Rifkind*”), held that “legal contention” questions or questions requiring the party
9 interrogated to make “law-to-fact” application, while appropriate for interrogatories, are
10 not proper in the deposition of a party who is represented by counsel. During the
11 deposition, counsel for AFSCME objected to many “legal contention” questions on
12 authority of *Rifkind*. (Soroushian Decl., ¶¶ 11-12 (filed concurrently with AFSCME’s
13 Opposition to City’s Supplemental Motion in Limine to Exclude Trial Testimony).) On
14 some (of the many improper legal contention questions) counsel instructed Allen not to
15 answer. (*Ibid.*) The City’s attorney, Arthur Hartinger, failed at deposition and in the
16 instant motion to provide contrary authority to *Rifkind* and declined to meet and confer.
17 (*Id.*, ¶¶ 14-17, 20.) The City has likewise failed to distinguish *Rifkind* and certainly
18 cannot do so where it has omitted any explanation of the disputed questions. (*Ibid.*)

19 This Motion *in Limine* is premised on asserted failure to answer objectionable
20 questions calling for a legal conclusion or involving mixed questions of law and fact to
21 which the City is not entitled through deposition. Therefore, this Motion *in Limine* should
22 be denied

23 **4. The City’s Motion is Otherwise Inadequate**

24 The City has failed in its obligation to meet and confer regarding the disputed
25 responses to deposition questions. California Code of Civil Procedure section 2025.480
26 requires a party to attempt to resolve a dispute informally through meeting and conferring
27 prior to filing a motion to compel. During Mr. Allen’s deposition, his counsel, Teague
28 Paterson, requested to meet and confer with the City’s counsel whenever he asked Mr.
Allen the objectionable questions. (Soroushian Decl., ¶¶ 16-17, 20.) Because this exact

1 issue had arisen in prior depositions -- on three prior occasions -- the City's attorney
2 should have been prepared to discuss the City's position and meet and confer. (See *id.*, ¶
3 13.) Indeed, Mr. Paterson read into the record his position citing and quoting from the
4 *Rifkind* holding (a case that had been cited to Mr. Hartinger in previously depositions).
5 (*Id.*, ¶ 14.) Mr. Hartinger refused to meet and confer, and did not respond to Mr.
6 Paterson's requests that the City provide contrary authority, but rather insisted on
7 proceeding. Tellingly, even in its MIL, the City has not distinguished nor discussed why
8 *Rifkind* should not apply in this instance. (*Id.*, ¶¶ 15-18, 20.)

9 Further, Mr. Allen, for his part, never actually refused to answer a question,
10 and Mr. Hartinger never confirmed that Mr. Allen was declining to answer his question
11 based on the advice of counsel (a pre-requisite to moving to compel). (Soroushian Decl.,
12 ¶ 19.) At the conclusion of the deposition, Mr. Hartinger indicated he would adjourn, but
13 not conclude, the deposition and would contact Mr. Paterson to discuss the "*Rifkind*"
14 issue. That never occurred and, instead, the City filed its motion. (*Id.*, ¶ 20.)

15 Simply, the City's counsel failed and refused to meet and confer at the
16 deposition, and adjourned the deposition pending further meet and confer (or provide
17 authority contrary to *Rifkind*) but never followed through with those obligations.

18 Furthermore, this Motion *in Limine* must fail for the further reason that the
19 City failed to file a motion to compel Mr. Allen's testimony prior to bringing this motion.
20 Even if it were to file a motion to compel, the motion would be inadequate because the
21 City failed to follow prerequisite procedure prior to filing such a motion, such as asking
22 the witness whether he was refusing to answer on advice of his attorney.

23 This Motion *in Limine* as to Charles Allen also fails because it is not
24 adequately presented. The City fails to identify with specificity a single question that it
25 asserts Allen did not answer fully or completely. This motion is completely lacking in
26 factual support. (*Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th at 670; *cf.*
27 CRC 3.1116(a)-(c) (requiring lodgment with the court of the relevant portions of the
28 deposition transcript prior to a hearing on a motion to compel); CRC 3.1345 (requiring the

1 questions and answers in dispute to be set for verbatim in a separate statement of disputed
2 questions in order to compel answers).) The City is asking this court to exclude Allen's
3 testimony based on the vague assertion that Allen did not fully answer some non-specified
4 questions, which would plainly be insufficient to obtain the lesser remedy of the granting
5 of a motion to compel further answers.

6 **F. Opposition to Motion *in Limine* Nos. 7, 10, 11 and 12**

7 The City makes no argument and provides no legal authority to support Motion
8 *in Limine* No. 12, to exclude proffered declarations by the plaintiffs on the grounds that
9 they constitute hearsay. The City's Motion fails to comply with Rule 3.113 of the
10 California Rules of Court, which requires a party filing a motion to file a supporting
11 memorandum containing "a concise statement of the law, evidence and arguments relied
12 on, and a discussion of the statutes, cases, and textbooks cited in support of the position
13 advanced." (CRC 3.113(b).) "The court may construe the absence of a memorandum as
14 an admission that the motion . . . is not meritorious and cause for its denial[]." The City's
15 failure to present any argument in support of Motion *in Limine* No. 12 is grounds for
16 denial. Indeed, the City's motion violates the principles for Motions *in Limine* set forth in
17 *Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659, 670, as the City has
18 presented no factual support or argument.

19 The City's Motions *in Limine* Nos. 11 and 12 must further be denied based on
20 equitable considerations. It was at the City's request that the parties stipulated to and that
21 the Court ordered that the parties submit declarations from anticipated trial witnesses to
22 minimize the number of witnesses and streamline their testimony. (See Stipulation and
23 Order re Pre-Trial Conference Procedures, pp. 3-4.) Petitioners desired to present further
24 witness testimony to support their causes of action. In particular, AFSCME and the San
25 José Retirees' Association have both alleged causes of actions for estoppel in their
26 complaints, and additional witness testimony would be appropriate to establish
27 'detrimental reliance.' However, Petitioners begrudgingly agreed to stipulate to limiting
28

1 the number of witnesses at trial if the parties agreed in good faith to accept a declaration
2 in lieu of testimony.

3 The City now unilaterally rejects the premise of the stipulation that it
4 previously presented and advocated by objecting to every declaration, apparently in the
5 entirety, on the basis of hearsay. The City's conduct smacks of bad faith to gain an unfair
6 advantage at trial. The City's conduct induced Petitioners' detrimental reliance and the
7 City should not be permitted to doubly benefit from its misconduct.

8 The City's Motion *in Limine* 7 is overbroad and on that basis alone the Court
9 should deny it. The blanket ruling sought now is unnecessary, too. The City does not
10 point to any anticipated testimonial evidence it claims contains legal conclusions. Such a
11 hypothetical, blanket request should be denied because the Court can address this issue for
12 at trial if the City raises a specific motion regarding particular testimony.

13 Regarding the City's Motion *in Limine* 10, Plaintiffs do not oppose this motion
14 as long as the City is not requesting that parties such as union officials be excluded at
15 trial; Plaintiffs respectfully request the Court deny Motion *in Limine* 10 to the extent that
16 it appears to be so overbroad as to include the parties.

17 The City seeks by Motion *in Limine* 11 to impose equal time limitations of 12
18 hours for the City to present its case and for all Petitioners combined to present their case.
19 The City seeks this limitation at the same time that it inequitably seeks to have the court
20 reject the streamlining of witness testimony by refusing to accept any witness declaration.

21 The four Petitioners have separate bargaining histories, are party to different
22 retirement systems, and represent different interests, and, therefore, require testimony
23 from separate witnesses. In contrast, the City has fewer witnesses that have knowledge of
24 the bargaining with each of the separate Petitioners. It is not equitable to limit the
25 Petitioners to equal time with the City. Further, such an order is impractical as it requires
26 the limitation of evidence useful to the court in resolving this lawsuit. Therefore, these
27 Motions *in Limine* should be denied.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

III

CONCLUSION

The Court should deny all twelve of these Motions *in Limine*. The City has failed to support its arguments to exclude evidence prior to trial. The Court is capable of managing at trial which evidence to exclude, if necessary. The City for its part may consider -- hopefully, more thoughtfully -- which evidentiary motions to bring during trial week. Further mischaracterization by the City of evidence or case authorities should not be tolerated at trial.

Dated: July 8, 2013

BEESON TAYER & BODINE

By Kristen Drake for
Teague Paterson
Vishtasp Soroushian
Attorneys for Plaintiff and Cross-Defendant
Municipal Employees' Federation,
AFSCME, Local 101

Dated: July 8, 2013

SILVER, HADDEN, SILVER, WEXLER &
LEVINE

By Kristen Drake for
Stephen H. Silver
Jacob Kalinski
Attorneys for Plaintiff San Jose Retired
Employees' Association

1 Dated: July 8, 2013

2 CARROLL, BURDICK & McDONOUGH LLP

3
4 By Kristen Drake for

5 Gregg McLean Adam

6 Gonzalo C. Martinez

7 Amber L. West

8 Attorneys for Plaintiff and Cross-Defendant
9 San Jose Police Officers' Association
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 *San Jose POA v. City of San Jose, et al.,*
2 Santa Clara County Superior Court, No. 1-12-CV-225926
3 (and Consolidated Actions 1-12-CV-225928, 1-12-CV-226570, 1-12-CV-226574,
4 1-12-CV-227864, and No. 1-12-CV-233660)

5 **PROOF OF ELECTRONIC SERVICE**

6 I declare that I am employed in the County of San Francisco, California. I am
7 over the age of eighteen years and not a party to the within cause; my business address is
8 44 Montgomery Street, Suite 400, San Francisco, CA 94104. On July 8, 2013, I served
9 the enclosed:

10 **PLAINTIFFS SAN JOSE POLICE OFFICERS' ASSOCIATION; MUNICIPAL EMPLOYEES'**
11 **FEDERATION, AFSCME, LOCAL 101; AND SAN JOSE RETIRED EMPLOYEES'**
12 **ASSOCIATION'S OPPOSITION TO CITY OF SAN JOSE'S MOTIONS *IN LIMINE***

13 by electronic service. Based upon a court order or an agreement of the parties to accept
14 service by electronic transmission, I caused the documents to be sent to the persons at the
15 electronic notification addresses listed below. I did not receive, within a reasonable time
16 after the transmission, any electronic message or other indication that the transmission
17 was unsuccessful.

18 Arthur A. Hartinger, Esq.
19 Linda M. Ross, Esq.
20 Jennifer L. Nock, Esq.
21 Michael C. Hughes, Esq.
22 Meyers, Nave, Riback, Silver & Wilson
23 555 12th Street, Suite 1500
24 Oakland, CA 94607
25 Phone: (510) 808-2000
26 Fax: (510) 444-1108
27 Email: ahartinger@meyersnave.com
28 lross@meyersnave.com
jnock@meyersnave.com
mhughes@meyersnave.com

Counsel for Defendants
City of San Jose (No. 1-12-CV-225926)


City of San Jose and Debra Figone
(Nos. 1-12-CV-225928;
1-12-CV-226570; 1-12-CV-226574;
1-12-CV-227864)

<p>Harvey L. Leiderman, Esq. Reed Smith LLP 101 Second Street, Suite 1800 San Francisco, CA 94105 Phone: (415) 659-5914 Fax: (415) 391-8269 Email: hleiderman@reedsmith.com</p>	<p><i>Counsel for Defendant Board of Administration for Police and Fire Department Retirement Plan of City of San Jose (No. 1-12-CV-225926)</i></p> <p><i>Necessary Party in Interest The Board of Administration for the 1961 San Jose Police and Fire Department Retirement Plan (No. 1-12-CV-225928)</i></p> <p><i>Necessary Party in Interest The Board of Administration for the 1975 Federated City Employees' Retirement Plan (Nos. 1-12-CV-226570; 1-12-CV-226574)</i></p> <p><i>Necessary Party in Interest The Board of Administration for the Federated City Employees Retirement Plan (No. 1-12-CV-227864)</i></p>
<p>John McBride, Esq. Christopher E. Platten, Esq. Mark S. Renner, Esq. Wylie, McBride, Platten & Renner 2125 Canoas Garden Ave., Suite 120 San Jose, CA 95125 Phone: (408) 979-2920 Fax: (408) 979-2934 Email: jmcbride@wmpirlaw.com cplatten@wmpirlaw.com mrenner@wmpirlaw.com</p>	<p><i>Counsel for Plaintiffs Robert Sapien, Mary McCarthy, Thanh Ho, Randy Sekany and Ken Heredia (No. 1-12-CV-225928)</i></p> <p><i>Teresa Harris, Jon Reger, and Moses Serrano (No. 1-12-CV-226570)</i></p> <p><i>John Mukhar, Dale Dapp, James Atkins, William Buffington and Kirk Pennington (No. 1-12-CV-226574)</i></p>
<p>Teague P. Paterson, Esq. Vishtasp M. Soroushian, Esq. Beeson, Tayor & Bodine APC Ross House, 2nd Floor 483 Ninth Street Oakland, CA 94607-4051 Phone: (510) 625-9700 Fax: (510) 625-8275 Email: TPaterson@beesontayer.com VSoroushian@beesontayer.com</p>	<p><i>Counsel for Plaintiff AFSCME Local 101 (No. 1-12-CV-227864)</i></p>

1 Stephen H. Silver, Esq.
2 Richard A. Levine, Esq.
3 Jacob A. Kalinski, Esq.
4 Silver, Hadden, Silver, Wexler & Levine
5 1428 Second Street, Suite 200
6 Santa Monica, CA 90401
7 Phone: (310) 393-1486
8 Fax: (310) 395-5801
9 Email: shsilver@shslaborlaw.com
10 rlevine@shslaborlaw.com
11 jkalinski@shslaborlaw.com

*Attorneys for Plaintiff San Jose Retired
Employees Association, Howard E.
Fleming, Donald S. Macrae, Frances J.
Olson, Gary J. Richert and Rosalinda
Navarro (No. 1-12-CV-233660)*

12 I declare under penalty of perjury that the foregoing is true and correct, and
13 that this declaration was executed on July 8, 2013, at San Francisco, California.

14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Joan Gonsalves